U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 November 2004

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In the Matter of:

ROBERT E. CLINE,
Claimant,

v. **Case No. 2003-BLA-06164**

CLINE BROTHERS MINING CO./
WEST VIRGINIA COAL WORKERS'
PNEUMOCONIOSIS FUND,
Employer/Carrier, and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party in Interest.
……..

Appearances:

Andrew Delph, Wolfe, Williamson and Rutherford, Norton, VA
For Claimant

Robert Weinberger, WV Workers' Comp. Defense Div., Charleston, WV
For Employer/Carrier

Before: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER GRANTING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §901, *et. seq.* (hereafter "the Act") filed by Claimant Robert Cline ("Claimant") on June 6, 2001. The instant claim is the second claim filed by Claimant. The putative responsible operator is Cline Brothers Mining Co. ("Employer").

Part 718 of title 20 of the Code of Federal Regulations is applicable to this claim, as it was filed after March 31, 1980, and the regulations amended as of December 20, 2000 are also

applicable, as this claim was filed after January 19, 2001.[1] 20 C.F.R. §718.2. In *National Mining Assn. v. Dept. of Labor,* 292 F.3d 849 (D.C. Cir. 2002), the U.S. Court of Appeals for the D.C. Circuit rejected the challenge to, and upheld, the amended regulations with the exception of several sections.[2] The Department of Labor amended the regulations on December 15, 2003 for the purpose of complying with the Court's ruling. 68 Fed. Reg. 69929 (Dec. 15, 2003).

The findings of fact and conclusions of law hereafter are based upon my analysis of the entire record, including all evidence admitted and arguments submitted by the parties. Where pertinent, I have made credibility determinations concerning the evidence.

STATEMENT OF THE CASE

Claimant's first claim was filed on May 12, 1993, and it was denied by the District Director on October 29, 1993. (DX1).[3] The denial was premised upon the District Director's finding that Claimant was not totally disabled due to pneumoconiosis. *Id.*

Claimant filed the instant claim on June 6, 2001. (DX3). The District Director issued a July 24, 2002 Schedule for the Submission of Additional Evidence, which indicated that Claimant would be entitled to benefits based on the initial evidence and that Cline Brothers Mining Company, Inc. was the responsible operator. (DX28). On a preliminary basis, the District Director's office concluded that the evidence indicated that the Claimant worked as a coal miner for 14 years, that Claimant has pneumoconiosis, that the Claimant's pneumoconiosis was caused at least in part by exposure to coal mine dust, that Claimant was totally disabled, and that Claimant's totally disabling impairment was caused at least in part by pneumoconiosis. *Id.* However, the Proposed Decision and Order issued by the District Director on March 11, 2003 denied benefits. (DX29). Although the District Director found that Claimant had pneumoconiosis arising out of coal mine employment, he denied the claim on the basis that the evidence did not show that the disease produced a breathing impairment sufficient to establish total disability. *Id*. The responsible operator was identified as "Cline Brothers Mining Company, Inc." *Id.* Claimant requested a formal hearing, and the case was transmitted to the Office of Administrative Law Judges on June 26, 2003 for a hearing. (DX36).

A hearing in the above-captioned matter was held on January 16, 2004 in Charleston, West Virginia. The Claimant was the only witness to testify. At the conclusion of the proceedings, the record was closed. (Tr. at 26). Thereafter, the parties were given until March 1, 2004 to submit briefs or closing arguments. *Id*. Claimant submitted an unopposed request for an additional seven days to file closing briefs on March 4, 2004. Employer/Carrier submitted its brief on March 5, 2004.[4] On March 9, 2004 Claimant's Brief in Support of Award of Benefits was submitted.

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[1] Section and part references appearing herein are to Title 20 of the Code of Federal Regulations unless otherwise indicated.

[2] Several sections were found to be impermissibly retroactive and one which attempted to effect an unauthorized cost shifting was not upheld by the court.

[3] Director's, Claimant's and Employer's Exhibits are referenced herein as "DX", "CX", and "EX", respectively, followed by the exhibit number; references to the January 16, 2004 hearing transcript appear as "Tr." followed by the page number.

[4] Employer/Carrier's brief is referenced herein as "Employer's Brief" followed by the page number.

At the hearing, Director's Exhibit 1 through 39 ("DX1" through "DX39") and Claimant's Exhibit 1 ("CX1") were admitted into evidence. The record was closed at the hearing on January 16, 2004 and the parties were allowed to submit post-hearing briefs or written closing arguments.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issues/Stipulations

The only two issues before me are total disability and causation of total disability.[5] (Tr. at 7-8). The employer stipulated to 14 years of coal mine employment, withdrew the issues of pneumoconiosis and causal relationship, and agreed that Employer Cline Brothers Mining Company was properly named as the responsible operator. (Tr. at 6).

Medical Evidence

The newly submitted medical evidence consists of the following:

X-Ray Readings	**Pulmonary Function Studies**	**Arterial Blood Gas Studies**	**Medical Examination Reports**
December 17, 2001[6] (DX19) M. Patel, B, BCR, positive, 1/0, p/s, 6 zones	December 6, 2001 (DX18) (Nonqualifying)	December 6, 2001 (DX15) (Nonqualifying- rest; Qualifying- exercise)	December 6, 2001 By Dr. Rasmussen (DX14)
December 17, 2001 (DX20) C. Binns (Quality Only) quality 1	August 14, 2002 (DX22) (Nonqualifying)	August 14, 2002 (DX22) (Nonqualifying)	August 26, 2002 By Dr. Zaldivar (DX22)
December 17, 2001 (DX21) (reread), J. Wiot, B, BCR, completely negative	December 1, 2003 (CX1) (Nonqualifying)	December 1, 2003 (CX1) (Nonqualifying-rest; Qualifying-exercise)	December 1, 2003 By Dr. Rasmussen (CX1)
August 14, 2002 (DX 22) G. Zaldivar, B, positive 1/0, p/p, 6 zones			
December 1, 2003 (CX1) M. Patel, B, BCR, positive, 1/0, s/t, 6 zones			

[5] Employer's brief stated that all issues were contested in this case; however, employer stated during the hearing that the only contested issues were total disability and disability causation. Therefore, this decision will only address the two contested issues agreed upon during the hearing. *See Employer's Brief* at 2; *see also* Tr. at 6-8.

[6] The date provided in this chart under x-ray readings is the date the x-ray was taken. "B" refers to a B-reader and "BCR" means a board certified radiologist.

Background and Employment History

Claimant was the only witness at the hearing, and he was a credible witness. Claimant is forty seven years old and married to his wife, Barbara, with two daughters ages twenty three and twenty two, who both attend college. (Tr. at 10-11).

Claimant testified that he began working in the coal mining industry in 1974, and he estimated that he had done underground coal mining work for about fifteen years. (Tr. at 11). Claimant's coal mining employment history began with E & P Coal Company in 1975, and he continued to work in the coal mining industry from 1975 through 1989.[7] (DX 4, 5). Thereafter, during 1992 and 1993, Claimant worked as a field representative for Rectron, Inc., a steel fabrication corporation. His employment with Rectron, Inc. does not qualify as coal mine work within the meaning of §725.107(a)(19), and thus it will not be computed in the number of years of coal mine employment.[8] At the hearing, the Employer stipulated to fourteen years of coal mining experience and I so find. (Tr. at 6).

While employed at Cline Brothers Mining Company, Claimant spent the majority of his work experience as a section foreman and a mine operator. (Tr. at 11). As section foreman, he spent at least three hours a day performing the work of the miners who refused to perform certain job tasks, such as running the continuous miner, due to excessive coal dust. (Tr. at 12). He operated equipment, unloaded supplies, pulled and hung heavy miner cable, set timbers, rock dusted, and moved belts. (CX1). Claimant routinely lifted forty to fifty pounds of miner cable as a part of his job duties. (Tr. at 18-19). He worked nine to twelve hours shifts daily in the coal mine. (Tr. at 23).

Claimant stopped working in the coal mines in 1989 due to a knee injury, and then he begin working as a field representative for the steel fabricator (Rectron). (Tr. at 13; 19-20). Presently, he is unemployed and only performs light household work. (Tr. at 14).

Claimant stated that his breathing condition is "bad," and he is only able to walk about one block before experiencing shortness of breath. (Tr. at 13). His shortness of breath worsens when walking up a hill, and he is only able to climb eight to ten stairs before he has to stop due to shortness of breath. (Tr. at 14). Presently, he is not being treated by a physician or taking any prescription drugs for breathing problems. (Tr. at 20).

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[7] Claimant's coal mine employers included: E & P Coal Company; B & H Coal Co. Inc.; Peter White Coal Mining Corp.; Greasy Creek Coal Co.; Peerless Alma Coal, Inc.; ABC Coal Co. Inc.; R & B Falcon Drilling; Cline & Trent Coal Co. Inc.; Sheba Coal Co.; Blue Bird Coal Co., Inc.; Lockfield Energy Corp.; New Elk Coal Co., Inc.; Double E Mining Inc.; War Eagle Const. Co.; Cline Brothers Mining Co., Inc.; and Thunder Mountain Energy, Inc. (DX 5, DX 4). Except for Lockfield Energy and Double E Mining, both of which conducted mining operations in Kentucky (Martin County), the mine sites were located in West Virginia.

[8] A coal miner is defined as one who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. 20 C.F.R. §725.101. Claimant testified that when he worked for Rectron, a steel fabricator, he was a salesman who visited strip jobs and prep plants. (Tr. at 13). He was not involved in the extraction or preparation of coal according to this job description. Therefore, he was not a coal miner during his employment with Rectron, Inc. in 1992 to 1993.

Claimant testified that he began smoking cigarettes at age 14 or 15 and continued to smoke until age 45 or 46, for approximately 32 years; however, he smoked a pipe for two of those years and cigars for one of the years. (Tr. at 16). He testified that he smoked up to one and a half packs per day for seven years, and he only smoked between one half to one full pack per day for the remaining twenty-five years. (Tr. at 21-22). On December 15, 2003 he quit smoking. *Id*. In the December 2001 DOL examination report, Dr. Rasmussen recorded that Claimant smoked one and a half packs per day since 1972. (DX14). Dr. Zaldivar in his report recorded that Claimant began smoking in his mid twenties and smoked one-half to one pack of cigarettes per day. (DX22). I find that 29 pack years is a reasonable estimate.

Discussion

To prevail in a claim for Black Lung benefits, a claimant must establish that he or she suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he or she is totally disabled, as defined in section 718.204; and that the total disability is due to pneumoconiosis. 20 C.F.R. §§718.202 to 718.204. The Supreme Court has made it clear that the burden of proof in a black lung claim lies with the claimant, and if the evidence is evenly balanced, the claimant must lose. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Director, OWCP v. Greenwich Collieries*, the Court invalidated the "true doubt" rule, which gave the benefit of the doubt to claimants. *See Id.* Thus, in order to prevail in a black lung case, a claimant must establish each element by a preponderance of the evidence.

Subsequent Claim Requirements

The instant case is a subsequent claim, because it was filed more than one year after the first denial of benefits in 1993. *See* §725.309(d). Previously, such a claim would be denied based upon the prior denial unless the Claimant could establish a material change in conditions. *See* 20 C.F.R. §725.309(d). The Fourth Circuit Court of Appeals held that a Claimant must prove, by a preponderance of the evidence developed subsequent to the denial of the prior claim, at least one of the elements adjudicated against him in the prior denial. *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358 (4th Cir. 1996) (en banc).

The amended regulations have replaced the material-change-in-conditions standard with the following standard:

> (d) If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see §725.502(a)(2)), the later claim shall be considered a subsequent claim for benefits. **A subsequent claim** shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim **shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement** (see §§725.202(d) (miner), 725.212 (spouse), 725.218 (child), and 725.222 (parent, brother, or sister)) **has changed**

since the date upon which the order denying the prior claim became final.[9] The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:
(1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.
(2) For purposes of this section, **the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based.** For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.
(3) **If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement.** . .
(4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim. . . .[Emphasis added.]

20 C.F.R. § 725.309(d) (2003). Thus, it is necessary to look at the new evidence relating to each medical condition of entitlement to determine whether it establishes that condition of entitlement.

The prior claim was denied based upon the failure to establish total disability. Thus, I must first determine whether the evidence establishes that the Claimant is totally disabled as a result of pneumoconiosis.

TOTAL DISABILITY

The regulations as amended provide that a claimant can establish total disability by showing pneumoconiosis prevented the miner "[f]rom performing his or her usual coal mine work," and "[f]rom engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time." 20 C.F.R. §718.204(b)(1). Where, as here, there is no evidence of complicated

[9] For a miner, the conditions of entitlement include whether the individual (1) is a miner as defined in the section; (2) has met the requirements for entitlement to benefits by establishing pneumoconiosis, its causal relationship to coal mine employment, total disability, and contribution by the pneumoconiosis to the total disability; and (3) has filed a claim for benefits in accordance with this part. 20 C.F.R. §725.202(d) *Conditions of entitlement: miner.*

pneumoconiosis, total disability may be established by pulmonary function tests, arterial blood gas tests, evidence of cor pulmonale with right sided congestive heart failure, or physicians' reasoned medical opinions, based on medically acceptable clinical and laboratory diagnostic techniques, to the effect that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in the miner's previous coal mine employment or comparable work. 20 C.F.R. §718.204(b)(2). For a living miner's claim, it may not be established solely by the miner's testimony or statements. 20 C.F.R. §718.204(d)(5).

According to his testimony and written submissions, Claimant's last coal mine employment of at least one year was with Cline Brothers Mining as a section foreman. (DX4). As a section foreman, he regularly operated equipment, unloaded supplies, pulled and hung heavy miner cable, set timbers, rock dusted, moved belts, and lifted forty to fifty pounds. (CX1). Based upon the newly submitted evidence, Claimant has established total disability under §718.204(b)(2) through arterial blood gas studies and well-reasoned medical reports.

Pulmonary function tests. Claimant has not established total disability through qualifying pulmonary function tests. Under subparagraph (i), total disability is established if the FEV1 value is equal to or less than the values set forth in the pertinent tables in 20 C.F.R. Part 718, Appendix B, for the miner's age, sex and height, if in addition, the tests reveal qualifying FVC or MVV values under the tables, or an FEV1/FVC ratio of less than 55%. The pulmonary function tests produced the following pre-bronchodilator and post-bronchodilator values[10]:

Date	**Exhibit No.**	**FEV1** (pre/post)	**FVC** (pre/post)	**MVV** (pre/post)	**FEV1/FVC** (pre/post)
12/6/01	DX18	3.39	4.51	127	75%
8/14/02	DX22	2.78/3.23	4.00/4.33	101/94	70%/75%
12/01/03	CX1	3.52/3.75	4.78/5.08	Not Listed	74%/74%

None of the new pulmonary function tests, taken on December 6, 2001, August 14, 2002, and December 1, 2003 produced qualifying values for the Claimant's age (44, 45, 46) and recorded height (71 inches). (DX18, DX22, CX1). *See* 20 C.F.R. §718.204(b)(2)(i). Accordingly, I find that the pulmonary function tests do not support a finding of total disability under §718.204(b)(2)(i).

Arterial blood gases. However, Claimant has satisfied the burden of proving total disability through arterial blood gas studies under §718.204(b)(2)(ii). The three newly submitted arterial blood gas studies produced the following values (rest/exercise):

Date	**Exhibit No.**	**PCO2** (rest/exercise)	**PO2** (rest/exercise)
12/6/01	DX15	37/34	70/64
8/14/02	DX22	41/42	79/74 (early termination)
12/01/03	CX1	37/36	66/60

[10] On 12/16/01 post-bronchodilator findings are not indicated.

In order to establish total disability, a miner with a PCO2 value of 34 must have a PO2 value of 66 or lower, either at rest or during exercise, and likewise a miner with a PCO2 value of 36 must have a PO2 value of 64 or lower. Appendix C to Part 718. Both the December 2001 and December 2003 test produced qualifying values during exercise under the regulatory standards set forth in 20 C.F.R. Part 718, Appendix C. An administrative law judge must provide a rationale for according greater probative value to the results of one study over those of another. *Coen v. Director; OWCP,* 7 B.L.R. 1-30 (1984); *Lessar v. C.F. & I. Steel Corp.*, 3 B.L.R. 1-63 (1981). I find the values produced during exercise to be more probative of Claimant's ability to perform last coal mine employment, because it assesses his oxygen levels during physical exertion, which was required by his last coal mine work. If the Claimant produced qualifying values during the course of a seven and eight minute light exercise study, it is reasonable to conclude that he is unable to work nine to twelve hours shifts involving heavy manual labor, as Dr. Rasmussen opined.[11]

If there is contrary evidence in the record, all evidence must be weighed as a whole to determine whether there is proof by a preponderance of the evidence that the miner is totally disabled. *Shedlock v. Bethlehem Mines Corp.,* 9 B.L.R. 1-195 (1986). Despite the August 2002 studies, which provided non-qualifying values during rest and exercise, I find that the two consistent studies that showed qualifying values during exercise satisfy the preponderance of the evidence standard. The only one of the three ABG tests that was specifically validated was the test performed during the December 6, 2001 DOL examination; the test was found to be technically acceptable by Dr. Mohammed Ranavaya, a DOL consultant. (DX 16). It is worth noting that the nonqualifying (August 2002) test was terminated prior to completion due in part to the Claimant's shortness of breath and Dr. Zaldivar did not comment upon the validity of the test in his report. Additionally, the last test administered (in December 2003) produced qualifying exercise values, a matter of significance given the progressive nature of pneumoconiosis. In considering the blood gas studies along with the Claimant's job description, which includes operating machinery, unloading supplies, and lifting fifty to sixty pound cables, I find that he is totally disabled and not capable of performing his last employment as section foreman. Based upon consideration of all the evidence, I find that Claimant has satisfied section 718.204(b)(2)(ii).

Cor pulmonale with right-sided congestive heart failure. There is no evidence of cor pulmonale or congestive heart failure, so Claimant has not established total disability under section 718.204(b)(2)(iii).

Medical opinion evidence on total disability. I also find that Claimant has established total disability through reasoned medical reports. The following two physicians provided medical opinions addressing the issue of whether Claimant is totally disabled due to pneumoconiosis: Dr. D.L. Rasmussen, who conducted the Department of Labor examination on December 6, 2001 and who again examined the Claimant on December 1, 2003 for the Claimant; and Dr. George Zaldivar, who examined Claimant on August, 14, 2002 on behalf of the Employer/Carrier.

[11] Dr. Rasmussen's two examination reports and conclusions he reached are discussed below.

(1) D.L. Rasmussen, M.D., whose curriculum vitae is not of record,[12] conducted an examination of Claimant on December 6, 2001, upon the Department of Labor's request. Dr. Rasmussen found chest expansion and diaphragmatic excursions to be normal. The breath sounds were minimally reduced with no rales, rhonchi, or wheezes. The heart tones and rhythm was regular with no mumurs, gallops, or clicks detected. He also reviewed the chest x-ray interpretation of Dr. Patel, which found pneumoconiosis. The ventilatory studies were normal; however, the maximum breathing capacity was slightly reduced. There was minimal resting hypoxemia. During an incremental treadmill exercise study, the Claimant exercised for seven minutes and reached a maximum of 2.6 mph at a 12% grade. He achieved an oxygen uptake of 15.8 cc/kg/min. which was 52% of his weight, and a heart rate at 74% predicted maximum. His volume of ventilation was normal and he retained a breathing reserve of 82 liters. However, the test showed impairment in oxygen transfer and hypoxia during light exercise which Dr. Rasmussen found to reflect a severe loss of lung function. Dr. Rasmussen concluded that this degree of impairment would render Claimant totally disabled for resuming his last coal mine employment, which requires heavy manual labor. (DX 14).

Based upon Claimant's significant history of coal mine dust exposure and x-ray findings, Dr. Rasmussen stated that it was medically reasonable to conclude that Claimant has coal worker's pneumoconiosis which arose from his coal mine employment. He also stated that both cigarette smoking and coal mine dust exposure were risk factors for the disease, but he found that the coal dust exposure was most significant because the impairment in oxygen transfer was much greater than the impairment in ventilatory function, a common finding among symptomatic coal miners. (DX14).

(2) George Zaldivar, M.D., who is board-certified in internal medicine and the subspecialty of pulmonary diseases,[13] conducted a physical examination of Claimant on August 14, 2002 at the request of the Employer/Carrier. He found minimal reduction of breath sounds with no murmurs or gallops, and he stated that the lungs were clear to auscultation with no wheezes, crackles or rales. He also reviewed the records of Dr. Rasmussen and the chest x-ray reading of Dr. Patel. In addition, Dr. Zaldivar conducted an exercise test, which was stopped due to Claimant's leg fatigue, shortness of breath and light headedness. However, during the six minute exercise study at a rate of 2.5 mph, Claimant reached a heart rate of 64.5%, an oxygen consumption of 52.4% of predicted at 14.9cc/kg/min., an anaerobic threshold of 42.6% of predicted maximal oxygen consumption, and a ventilatory reserve of 54%. Dr. Zaldivar reported the blood gases were "normal" and that the oxygen pulse rose normally.[14] He concluded from

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[12] The District Director reported Dr. Rasmussen's qualifications as "Board-certified in Internal Medicine, Subspecialty in Pulmonary Medicine." (DX 29). It is unclear where that information was obtained. The American Board of Medical Specialties online directory (www.abms.org) only shows that Dr. Rasmussen is board certified in internal medicine.

[13] According to his 1997 curriculum vitae, inter alia, Dr. Zaldivar was board certified in internal medicine and pulmonary diseases. (DX 22). The online directory of the American Board of Medical Specialties (www.abms.org) lists Dr. Zaldivar as board certified in internal medicine with the subspecialties of pulmonary disease and critical care medicine.

[14] Although on a test report summary (dated with Claimant's birth date rather than the test date), Dr. Zaldivar stated that the "[b]lood gases showed normal results", they were not in the expected range and the printed report flagged the oxygen (PO2) values as "L" for "low." (DX 22). The PO2 values were reduced with exercise, as noted above.

the exercise study that normal cardiopulmonary response to exercise did not justify the sensation of shortness of breath reported by Claimant. (DX 22).

In a letter enclosed with the medical report, he stated the following findings: radiographic evidence of pneumoconiosis; mild reversible airway obstruction; air trapping by lung volumes; mild diffusion impairment resulting from Claimant's smoking habit; high carboxyhemoglobin of a current smoker, and normal cardiopulmonary stress test up to the point where the test was stopped due to complaints of shortness of breath. He opined that there was evidence of coal worker's pneumoconiosis acquired through coal mine employment and that there was mild pulmonary impairment due to smoking and coal mine work, but he concluded that Claimant was capable of performing his usual coal mining work as evidenced by the results of the exercise test. (DX22).

(3) Dr. Rasmussen conducted another physical examination of Claimant on December 1, 2003 at the Claimant's request. The examination of the chest revealed no expansion and diaphragmatic excursions, but the breath sounds were moderately to markedly reduced. There was some prolonged expiratory phase with forced respirations with no rales, rhonchi or wheezes. Claimant's heart tones were normal with regular rhythm, and no murmurs, gallops or clicks were detected. Dr. Rasmussen considered the new chest x-ray interpretation of Dr. Patel taken on December 1, 2003, which indicated pneumoconiosis. The ventilatory function studies were normal without significant change following bronchodilator therapy but the single breath carbon monoxide diffusing capacity was minimally reduced.

The Claimant underwent an incremental treadmill exercise study, which lasted eight minutes and reached a maximum speed of 2.6 mph at 15% grade. He achieved an oxygen uptake of 19.7 cc/kg/min. which was 69% of his predicted maximum oxygen uptake. He exceeded his anaerobic threshold normally at 44% of his predicted maximum oxygen uptake, and his heart rate was excessive at 80% of predicted maximum. His volume of ventilation was normal and he retained a breathing reserve of 73 liters. According to Dr. Rasmussen, the exercise study revealed a marked impairment in oxygen transfer and the Claimant was at least minimally hypoxic. Specifically, Dr. Rasmussen stated:

> Overall, these studies indicate marked loss of lung function as reflected by the impairment in oxygen transfer during moderate exercise. This degree of impairment would render this patient totally disabled from resuming his last regular coal mine job with its attendant requirement for heavy and some very heavy manual labor.

(CX 1). Dr. Rasmussen therefore concluded, as he had in the December 6, 2001 examination report, that the Claimant was incapable of resuming his previous coal mine employment from a respiratory standpoint.

Factors to be considered when evaluating medical opinions include the reasoning employed by the physicians and the physicians' credentials. *See Millburn Colliery Co. v. Hicks,* 138 F.3d 524, 536 (4th Cir. 1998). A doctor's reasoning that is both reasoned and documented, and is supported by objective medical tests and consistent with all the documentation in the

record, is entitled to greater probative weight. *See Fields v. Island Creek Coal Co.,* 10 B.L.R. 1-19 (1987).

Dr. Rasmussen's December 2001 medical report was comprehensive and supported by objective medical evidence. He provided a detailed summary of the Claimant's work description, which is necessary in the evaluation of total disability. He outlined the findings of the physical examination, ventilatory studies, and blood gas studies and ultimately based his conclusion of total disability on the results from the exercise study, which indicated that oxygen transfer was impaired during exercise. The report of Dr. Rasmussen concluded that the Claimant was unable to perform his last coal mine employment requiring heavy manual labor. I find the December 2001 report of Dr. Rasmussen to be well reasoned and supported by objective medical evidence. Similarly, the second report submitted by Dr. Rasmussen in December 2003 was also documented and sound, and he reached the same conclusion as in the December 2001 report.

Employer argued that Dr. Rasmussen's opinion conflicts with the objective medical results of the pulmonary function studies and resting arterial blood gas studies and should not be credited; however, a physician may find total disability where pulmonary function tests and/or blood gas studies are nonqualifying. *Employer's Brief* at 5. *See* 20 C.F.R. §718.204(b)(2)(iv). The fact that some test results are nonqualifying does not discredit the reasoning of the medical report, because total disability may be shown through proof of pulmonary function tests, arterial blood gas tests, cor pulmonale with right-sided congestive heart failure, or a well-reasoned medical report. The regulations do not require proof of all four criteria in order to establish total disability. Therefore, I reject Employer's argument.

The medical report of Dr. Zaldivar was also thoroughly documented, but the report lacks the same level of analysis as provided by Dr. Rasmussen. The actual medical report merely stated impressions without providing any conclusions regarding total disability; however, the letter attached to the medical report by Dr. Zaldivar concluded that the Claimant was capable of performing his last employment based upon the results of the exercise test. In his findings, he failed to address how the Claimant's history of shortness of breath impacted his ability to perform his last coal mine job. Further, he did not discuss how the mild pulmonary impairment affected Claimant's ability to perform heavy manual labor, which was required by his last coal mine employment.

Employer argued that I should credit the opinion of Dr. Zaldivar over Dr. Rasmussen, because Dr. Zaldivar is most qualified to render an opinion on total disability due to his board certification in pulmonary diseases while Dr. Rasmussen is only board certified in internal medicine. *Employer's Brief* at 5. Nonetheless, I find that both physicians are highly qualified to express opinions based upon their experience in the area of pulmonary medicine and publications of medical articles on the subject of pulmonary impairment.[15] Thus, my credibility

[15] Dr. Rasmussen's medical opinions list him as a doctor in the division of pulmonary medicine, although the curriculum vitae was not submitted for him in the record. Dr. Rasmussen listed one of his publications entitled "Impairment of Oxygen Transfer in Dyspneic Non-Smoking Soft Coal Miners," Journal of Occupational Medicine, 1971, Vol. 13, pp. 300-305 as a reference in his medical report. (CX1). Dr. Zaldivar has the following two publications listed in his curriculum vitae: "Blood Gas Analysis As a Determinant of Occupationally Related Disability", Journal of Occupation Medicine, V 32, No. 5, pp. 440-443 (May 1990); "Airway Obstruction, Coal Mining and Disability," Occupational and Environmental Medicine 1994, vol. 51, pp. 234-238. (DX22).

determinations are based solely on the quality and reasoning employed in the medical reports. In comparing the reports, I find that Dr. Rasmussen's report is more persuasive, because the report provided an explanation on how the pulmonary impairment affects Claimant's ability to perform the heavy manual labor required by his last employment. Dr. Zaldivar failed to elaborate on how Claimant's ability to perform his job duties were impacted by the pulmonary impairment. Therefore, I find that the medical opinion evidence also establishes total disability under §718.204(b)(2)(iv).

Other evidence. The only other pertinent newly submitted evidence would be the Claimant's testimony during the hearing.[16] Employer/Carrier argued that Claimant negated his own claim of total disability through his testimony, because he stated that he would be capable of performing his last coal mine employment absent his knee injuries. *Employer's Brief* at 6. However, I find that this argument misconstrues Claimant's testimony. Claimant was testifying regarding his last coal mine work in 1989, and he stated that he could have continued working at that time if he had not undergone knee surgery for an injury. (Tr. at 20). The testimony was clearly relating to his assessment regarding his working condition in 1989, which was about fifteen years ago. In contrast, Claimant's description of his limited current capabilities at the hearing supports a finding of total disability. As noted above, the regulations recognize that pneumoconiosis is a progressive disease. Therefore, I find that Claimant's testimony is consistent with a finding of total disability. Furthermore, I find the medical evidence coupled with the Claimant's specific testimony as to his capabilities to be more probative on the issue of total disability than the Claimant's subjective opinion.

Section 718.204(b)(2) as a whole. Looking at §718.204(b)(2) as a whole, I find that total disability has been established by the newly submitted evidence, including arterial blood gas studies and medical opinions. Based solely upon the newly submitted evidence, Claimant has established at least one condition of entitlement, the element of total disability, in order to satisfy the requirement of reopening the case for review. Therefore, I find that Claimant has meet the burden of proof required under §725.309(d).

I also find that Claimant has established that he is totally disabled from a pulmonary or respiratory standpoint based upon all of the evidence of record. In this regard, in addition to the newly submitted evidence, there is evidence from the previous (1993) claim on the issue of total disability, consisting of the medical examination report and clinical findings from Dr. Oscar Carrillo's May 1993 examination of the Claimant. Although Dr. Carrillo did not find the Claimant to be totally disabled in May 1993, I find that the more recent medical data is more probative of the Claimant's current condition, given the progressive nature of the disease.

Inasmuch as the Claimant has established total disability, I will proceed by evaluating the only remaining element of entitlement, which is causation of total disability. As noted above,

[16] A May 30, 1997 Decision of Administrative Law Judge relating to the Claimant's state worker's compensation claim is also of record, having been submitted on June 13, 2001. (DX 7). I do not find the recitation of evidence in that decision to be competent evidence on the issue of the Claimant's current disability.

the Employer has stipulated to the elements of existence of pneumoconiosis and causal relationship to coal mine employment. (Tr. at 6).[17]

CAUSATION OF TOTAL DISABILITY

After establishing that a miner was totally disabled, a claimant must still establish that the miner's total disability was caused by his or her coal mine employment. 20 C.F.R. §718.24(a). If the presumptions are not available to a claimant, that claimant must prove the etiology of the disability by a preponderance of the evidence, even if he or she has proven the existence of total disability. *See Tucker v. Director*, 10 B.L.R. 1-35, 1-41 (1987). Under the amended regulations, the finder-of-fact must not take into account any non-pulmonary or non-respiratory impairments a miner may have when making this determination, unless said condition causes a chronic respiratory or pulmonary impairment. 20 C.F.R. §718.204(a). In meeting this last requirement, a claimant must show that "pneumoconiosis…. is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment," which means that it had a material adverse effect on the miner's respiratory or pulmonary condition or that it materially worsened a totally disabling respiratory or pulmonary impairment caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1). The new regulations allow for a finding of total disability due to pneumoconiosis even when there is another totally disabling respiratory or pulmonary condition if pneumoconiosis has a material adverse effect or materially worsens an unrelated total respiratory or pulmonary disability. *See* 20 C.F.R. §204 (2001).

In *Gross v. Dominion Coal Corp.,* the Benefits Review Board held that a medical opinion stating that pneumoconiosis was one of the two causes of the miner's total disabling pulmonary condition, but which did not attempt to specify the relative contributions of coal dust exposure and cigarette smoking, was sufficient to satisfy the new standard. *Gross v. Dominion Coal Corp.,* BRB No. 03-0118 BLA (Benefits Review Board, Oct. 29, 2003).[18]

Medical opinions regarding causation of total disability were offered in connection with the instant claim both by Drs. Rasmussen and Zaldivar. Dr. Rasmussen stated in his December 2001 report that Claimant's two risk factors for pneumoconiosis were cigarette smoking and coal dust exposure, but he reasoned that the coal dust exposure was most significant since his impairment in oxygen transfer was much greater than his normal ventilatory function, which was a common characteristic among symptomatic coal miners. (DX 14). In the December 2003 report, Dr. Rasmussen also reached the same conclusion that Claimant's coal mine dust exposure was capable of producing impairment in oxygen transfer absent ventilatory impairment, which is not a pattern seen typically with cigarette smoking. (CX1). Additionally, he cited two published medical articles which addressed the issue. I find that the opinion of Dr. Rasmussen's establishes that pneumoconiosis is a substantially contributing cause of Claimant's total disability.

[17] The Employer's stipulations are consistent with the record before me, which establishes that the Claimant had pneumoconiosis and that it was causally related to his coal mine employment.

[18] The decision is available on the BRB website, which may be accessed via a link from the OALJ website at www.oalj.dol.gov.

Apart from stating his disagreement that the Claimant was totally disabled, a position that I have already rejected, Dr. Zaldivar does not rebut a finding that coal mine work was a substantially contributing cause of total disability. Rather, Dr. Zaldivar's report stated that the Claimant's mild pulmonary impairment resulted from a combination of smoking and coal mine work but failed to address whether either factor was a major contributing cause. Although Dr. Zaldivar did not find a totally disabling pulmonary condition, he did state that the mild pulmonary impairment resulted from a combination of smoking and coal mine work without specifying to what extent each cause contributed to the impairment. According to the *Gross* standard, such statement supports the requirement that pneumoconiosis have at least "a material adverse effect" on the miner's pulmonary condition. Thus, this report also substantiates the fact that pneumoconiosis was a contributing cause of the total disability.

Turning to the medical evidence previously of record, the only relevant medical evidence on the issue of causation is the May 25, 1993 DOL medical report by Dr. Carrillo. (DX 1). The pulmonary function tests and resting ABGs were nonqualifying; exercise ABGs were not taken due to the Claimant's back pain. In his report, Dr. Carrillo characterized the Claimant's impairment as "mild" and stated the etiology of the Claimant's mild impairment was exposure to coal dust and cigarette smoke. Similar to Dr. Zaldivar's report, he also failed to indicate to what extent each cause contributed to the impairment. Therefore, this report under the *Gross* standard also supports that pneumoconiosis have at least "a material adverse effect" on the miner's pulmonary condition.

As stated above, the credentials of both Drs. Rasmussen and Zaldivar are satisfactory, and no information concerning Dr. Carrillo's credentials are present in the record. Thus, in weighing the medical reports I based my determinations solely on the content of the opinions.

After considering all of the evidence on disability causation, I give more probative weight to the report of Dr. Rasmussen, because it is both well reasoned and conclusive on the issue of disability causation. Moreover, the opinion of Drs. Zaldivar and Carrillo do not undermine Dr. Rasmussen's conclusions. Therefore, I find that Claimant has proven by a preponderance of the evidence that pneumoconiosis was a substantially contributing factor to the Claimant's total disability.

CONCLUSION

Claimant has proven the elements of total disability and causation of disability through the submitted evidence, and the remaining issues of the existence of pneumoconiosis and its causal relationship to coal mine employment were stipulated to by Employer during the hearing. Thus, having established all of the requisite elements of entitlement under the Act and regulations by a preponderance of the evidence, Claimant is entitled to the award of benefits.

Onset Date

Under §725.503(b), the date of commencement of benefits is "the month of onset of total disability." However, "where the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed." *Id*. None

of the medical evidence or testimony offered in connection with this claim conclusively establishes the precise date that Claimant became totally disabled due to pneumoconiosis. Accordingly, benefits shall commence as of June 2001, the date Claimant filed this subsequent claim for benefits.

Attorney's Fee

No award of attorney's fees is made herein, because no fee application has been received. *See* 30 U.S.C. §932; 33 U.S.C. §928. The Claimant's attorney shall have thirty days for submission of a fee application in conformance with 20 C.F.R. Part 725 and the other parties shall have thirty days to file any objections, provided that these dates may be extended upon the stipulation of the parties or for good cause shown.

ORDER

IT IS HEREBY ORDERED that the claim of Robert Cline for black lung benefits be, and hereby is, **GRANTED** and Cline Brothers Mining Company, through the West Virginia Coal Workers' Pneumoconiosis Fund, shall commence payment of benefits with an effective date of June 1, 2001.

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PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. §725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.